STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 25, 2003
v	No. 242717 Ingham Circuit Court
MICHAEL PAUL SHERWOOD, Defendant-Appellant.	LC No. 01-077632-FC

Before: Sawyer, P.J., and Griffin and Smolenski, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of five counts of first-degree criminal sexual conduct (CSC I), MCL 750.520(1)(b)(ii) (victim age thirteen to fifteen and actor related to victim). He was sentenced to concurrent prison terms of 120 to 360 months for each count. We affirm.

Defendant's convictions arise from allegations that, when defendant was age seventeen or eighteen, he sexually assaulted his sister, who is approximately four years younger than he. Her testimony indicated that other uncharged acts of sexual conduct between herself and defendant began much earlier, when she was seven years old and he was approximately eleven years old.

I

Defendant first argues that the trial court erred by admitting, under MRE 404(b), the complainant's testimony regarding numerous uncharged sexual acts between her and defendant. We conclude that the trial court did not abuse its discretion, *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003), by admitting the testimony at issue. The complainant testified that defendant engaged in numerous sexual acts and inappropriate touching with her over a period of many years before the charged acts. Evidence of other sexual acts between a defendant and a complainant may be admissible if they lived in the same household and, without such evidence, the complainant's testimony would seem incredible. *People v Layher*, 238 Mich App 573, 585; 607 NW2d 91 (1999), aff'd on other grounds 464 Mich 756 (2001). Here, the complainant's testimony about the charged acts might well have appeared incredible without the testimony about the prior acts, because the jury could have found it implausible that defendant would begin sexually assaulting her when she was a relatively older child after they had lived together as children in the same household throughout the complainant's childhood. We likewise determine that the trial court did not abuse its discretion in concluding that the probative value of this

evidence was not substantially outweighed by the danger of unfair prejudice, MRE 403, given its direct relevance to the complainant's credibility and that an appropriate limiting instruction was given to the jury. *Id.* at 586.

Defendant also argues that the trial court's limiting instruction regarding the proper use of this testimony was given too late in the proceedings. First, this argument is not properly presented because it is not within the scope of defendant's statement of the issues presented. *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). Further, defendant did not preserve this issue by objecting to the timeliness of the instruction below. Therefore, our review is for plain error only.

The limiting instruction, which was given in the trial court's final instructions to the jury, cautioned the jury to consider the complainant's testimony about the uncharged acts only to help it "judge the believability of testimony" regarding the charged acts and that it must not decide that the evidence shows defendant is a bad person or likely to commit crimes, or convict defendant based on other bad conduct. Defendant cites no case law, nor have we found any, stating that a limiting instruction given only during the final instructions constitutes error. Accordingly, because there was no plain error in the content or timing of this limiting instruction, defendant is not entitled to relief based on this unpreserved issue.

II

Defendant next argues that there was insufficient evidence to support his five CSC I convictions in this case. In deciding whether there was sufficient evidence to support a conviction, we view the evidence in the light most favorable to the prosecution and decide whether any rational factfinder could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Gonzalez*, 468 Mich 636, 640; 664 NW2d 159 (2003). In the context of this case, CSC I requires that the defendant engaging in sexual penetration with another person who is at least thirteen years old, but less than sixteen years old, and who is related to the defendant "by blood or affinity to the fourth degree." MCL 750.520b(1)(b)(ii). The complainant testified to the occurrence of the five pertinent incidents that occurred from approximately October 1999 to May 2000, in which defendant vaginally penetrated her with his penis. Based on the complainant's testimony as to her birth date, she would have been either thirteen or fourteen years old at the time of each charged incident. She also identified defendant as her brother. Thus, we find that there was sufficient evidence to support defendant's CSC I convictions. Although defendant argues that the complainant was not credible and that other evidence undermines her credibility, when assessing the sufficiency of the evidence we must draw all reasonable inferences and make credibility choices in support of the jury's verdict. *Gonzalez, supra* at 640-641.

III

Next, defendant argues that the trial court erred by allowing the late endorsement of Emily Meinke as a witness. Meinke testified about certain statements that she claimed defendant made to her. MCL 767.40a(3) requires the prosecution to provide the defense with a list of witnesses that it intends to produce at trial not less than thirty days before trial. However, MCL 767.40a(4) provides that the prosecution may add witnesses to the list at any time on leave of the court for good cause shown. In this case, at a pretrial hearing, the prosecutor indicated that the

police did not learn from Meinke about the statements she claimed defendant made to her until less than thirty days before trial was scheduled to begin. Because the prosecution was not aware of the testimony the witness could provide before it was required to send the initial witness list to the defense, we find there was good cause for allowing the late endorsement. Accordingly, the trial court did not abuse its discretion. *People v Herndon*, 246 Mich App 371, 402; 633 NW2d 376 (2001).

IV

Defendant argues that the prosecutor committed misconduct by arguing facts not in evidence in his rebuttal argument. We disagree. "The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial." *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). In the pertinent remarks, the prosecutor stated:

> Roxanne Doss. A friend of [the complainant's]? I don't see her supporting [the complainant] today. In this courtroom I don't see her supporting [the complainant]. People have taken sides. Roxanne Doss has taken a side. She's taken the Sherwood family's side.

Doss testified on defendant's behalf. The prosecutor's comments referred to Doss' friendship with the Sherwood family as a basis for questioning her credibility. This was supported by Doss' acknowledgement on cross-examination by the prosecutor that she had known the Sherwood family for three years and had contact with them sometimes. Because a prosecutor may argue from the facts that a witness is not worthy of belief, *Avant, supra* at 512, the remarks were not improper.

V

Defendant also argues that this case should be remanded to give him an opportunity for him to establish that the results of a polygraph examination administered by the state police pursuant to MCL 776.21(5) were inaccurate and to allow him to move for a new trial on that basis.[1] We disagree. MCL 776.21(5) provides:

> A defendant who allegedly has committed a crime under sections 520b to 520e and 520g of Act No. 328 of the Public Acts of 1931, shall be given a polygraph examination or lie detector test if the defendant requests it.

Under the plain language of this statute, defendant was entitled to a polygraph examination or lie detector test upon request, which was administered by the state police in September 2001. The implication of defendant's position on appeal is that he is further entitled to an opportunity to judicially challenge the results of that polygraph examination, or the interpretation of those results by the state police. However, nothing in the plain language of MCL 776.21(5) provides a

[1] In this regard, defendant argues that a report from an independent polygraph examiner, obtained after defendant was sentenced, indicates that he was telling the truth in denying that he had sexual relations with the complainant after he was seventeen years old.

defendant with the right to any such judicial challenge, particularly post-conviction. Nor may we properly read such a right into the statute because "a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002). Moreover, we are left to ponder the utility of a new trial on this basis given that polygraph test results are not admissible at trial. *People v Phillips*, 469 Mich 390, 397; 666 NW2d 657 (2003). Thus, we find defendant is not entitled to relief based on this issue.

VI

Finally, defendant argues that this case should be remanded to allow him an opportunity to show that trial counsel was ineffective for failing to investigate whether the state police polygraph results were accurate. We disagree. To establish such a claim, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that this prejudiced his defense. *People v Riley*, 468 Mich 135, 140; 659 NW2d 611 (2003). To show the requisite prejudice, defendant must establish that there is a reasonable probability that the result of the proceeding would have been different but for counsel's deficient performance. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Here, there is no reasonable probability that further investigation by trial counsel regarding the state police polygraph test would have affected the outcome of the trial because the results of the test were not offered into evidence at trial and the defense could not have offered evidence of its interpretation of the polygraph test results at trial. *Phillips, supra* at 397 (polygraph test results inadmissible at trial). Further, in light of the prosecution's active defense of defendant's convictions on appeal, we believe it is evident that there is no reasonable probability that the opinion of defendant's polygraph examiner attacking the state police interpretation of its polygraph test results would have led the prosecution to voluntarily dismiss the charges brought in this case. Therefore, we conclude defendant cannot establish an ineffective assistance of counsel claim on this basis.

Affirmed.

/s/ David H. Sawyer
/s/ Richard Allen Griffin
/s/ Michael R. Smolenski